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No. 96-434

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

UNITED ARAB EMIRATES, MINISTRY OF DEFENSE OF THE UNITED ARAB EMIRATES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

Respondents United Arab Emirates (UAE) and Ministry of Defense of the United Arab Emirates (UAE Ministry of Defense) hereby point out certain misstatements and omissions of fact in the Petitioner's Statement of Facts.

With respect to the September 23, 1986 Military Training Agreement entered into between the UAE and the United States Department of Defense, R. Vol. II, pp. 316-23, the Petitioner, MCI Telecommunications Corp. (MCI) was not a party to that agreement. Moreover, the UAE did not explicitly guarantee payment or assume

responsibility for any debts incurred by members of the UAE Student Battalion for their personal living expenses under any provision of the aforesaid Military Training Agreement. Rather, under Note 5 of the Military Training Agreement, the UAE merely agreed "to ensure prompt payment for such expenses" by Student Battalion members. Vol. II, p. 319.[1]

With respect to the factual assertion that, at the meeting held on January 6, 1988 in Washington, D.C., the UAE Ambassador Ahmed Salim Al Mokarrab "told the three MCI representatives that if the unauthorized calls were attributable to members of the Student Battalion, the UAE would assume responsibility and would pay MCI for the calls" (Pet. 4), Ambassador Mokarrab has denied that he ever made any such representations (Resp. App. 2a). The UAE's military attache, Lieutenant Colonel Mubarak Rashid Al Ghafli, who was also present at the January 6, 1988 meeting, has likewise denied that Ambassador Mokarrab ever made any such representations. (*Id.* 10a, 11a)

With respect to the factual assertion that, on February 17, 1988, the UAE military attache "informed an MCI manager that the UAE would 'definitely' compensate MCI for its losses if members of the Student Battalion were involved" (Pet. 4), again Colonel Mubarak has denied making any such representation (*Id.* 11a)

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[1] In any case, MCI appears to have abandoned its claim based on Note 5 of the Military Training Agreement. The Fifth Circuit below unanimously held that there was "nothing in the nature of [the Military Training Agreement], even considering the provisions of Note 5, that would constitute commercial activity" (Pet. App. 9a, 11a). MCI does not question this ruling of the court of appeals in its Petition.

REASONS FOR DENYING THE PETITION

I. THE FIFTH CIRCUIT CORRECTLY DECIDED THAT THE UAE AND THE UAE MINISTRY OF DEFENSE DID NOT ENGAGE IN "COMMERCIAL ACTIVITY" WITH RESPECT TO THE ALLEGED PROMISES MADE TO MCI THROUGH DIPLOMATIC CHANNELS.

The Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1330, 1602-1611, mandates that "a foreign state *shall* be immune from the jurisdiction of the courts of the United States," 28 U.S.C. § 1604 (emphasis added), "unless one of several statutorily defined exceptions applies." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611 (1992). Thus, the FSIA provides the "sole basis" for obtaining jurisdiction over a foreign sovereign in the United States. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989).

Under the Act, "a foreign state is presumptively immune from the jurisdiction of United States courts[.]" *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993). Unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state. *Id.* at 355; *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488-89 (1983).[2]

The only exception relied upon by MCI to overcome the presumption of sovereign immunity is the so-called "commercial activity" exception, which provides that a foreign state shall not be immune in any case "in which the action is based upon a commercial activity carried on in the United States by the foreign state[.]" 28 U.S.C. § 1605(a)(2). The FSIA defines "commercial activity" to mean

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[2] It is undisputed that the UAE and the UAE Ministry of Defense both qualify as "foreign state[s]" within the meaning of the FSIA. *See* 28 U.S.C. 1603(a), (b) (defining term "foreign state" as including "an agency or instrumentality of a foreign state").

> either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

28 U.S.C. § 1603(d).

Although this definition "leaves the critical term 'commercial' largely undefined," *Republic of Argentina v. Weltover, Inc., supra,* 504 U.S. at 612, the Court "has developed some additional guidelines." *Holden v. Canadian Consulate,* 92 F.3d 918, 920 (9th Cir. 1996). Thus, in view of the fact that the Act "largely codifies" the "restrictive" theory of foreign sovereign immunity, *Republic of Argentina v. Weltover, Inc., supra,* 504 U.S. at 612, a foreign state engages in commercial activity when it exercises "only those powers that can also be exercised by private citizens[,]" as opposed to those "powers peculiar to sovereigns." *Id.* at 614 (quoting *Alfred Dunhill of London, Inc. v. Republic of Cuba,* 425 U.S. 682, 704 (1976)). In other words, the commercial activity exception applies only in those instances where the sovereign acts " 'in the manner of a private player within' the market." *Saudi Arabia v. Nelson, supra,* 507 U.S. at 360 (quoting *Republic of Argentina v. Weltover, Inc., supra,* 504 U.S. at 614).

MCI contends that the alleged promises made to MCI by the UAE Embassy's diplomatic officials in direct response to MCI's presentation of a petition for redress of grievances through diplomatic channels, namely that the UAE would pay certain debts owed by UAE citizen-soldiers *if* MCI agreed not to pursue legal action against such citizen-soldiers *and if* MCI presented adequate proof that in fact the said citizen-soldiers were responsible for the debts in question, constitute "commercial activity"

under this exception.[3] As will be shown below, however, the Fifth Circuit correctly held that the alleged acts of the UAE's embassy personnel in making conditional promises to pay in connection with the official consideration, investigation, and denial of MCI's petition for redress presented through diplomatic channels, was activity "clothed with a diplomatic nature, not a commercial one" (Pet. App. 8a). Moreover, MCI's contentions to the contrary notwithstanding, the Fifth Circuit's holding does not conflict with the general principles laid down in *Weltover* and *Nelson*, nor with the decisions of the other courts

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[3] As pointed out above, both Ambassador Mokarrab and Colonel Mubarak have denied making the representations in question (Resp. App. 2a, 11a). In addition, any agreement entered into between the UAE and MCI under the terms of which MCI was to refrain from prosecuting the members of the UAE Student Battalion in Texas state court for their alleged illegal use of telecommunications services while stationed at Ft. Bliss, Texas, would have been illegal and unenforceable under Texas law. *See Merrell v. Timmons*, 138 Tex. 250, 158 S.W.2d 278, 279 (1941); *Sriver v. McCann*, 155 S.W. 317, 320 (Tex. Civ. App.—Amarillo 1913, writ dism'd w. o. j.); 6A A. Corbin & J. Perillo, *Corbin on Contracts* § 1421 at 355, 358 (1962) ("A bargain the purpose of which is the stifling of a prosecution is in all cases contrary to public policy and illegal"; a settlement agreement is illegal "when a consideration is given in exchange for actual forbearance to prosecute or for a promise of such forbearance"; *see also Lewkowicz v. El Paso Apparel Corp.*, 625 S.W.2d 301, 304 (Tex. 1981) ("A contract made in consideration of compounding a criminal offense is void because it is in contravention of the Penal Code and public policy"). In view of the illegality of the alleged agreement, it is also highly questionable whether either Ambassador Mokarrab or Colonel Mubarak had the authority to bind the UAE in such a transaction with a nonsovereign third party, and whether MCI's reliance on these diplomatic officials' apparent authority to bind the UAE was reasonable under the circumstances. *See First Fidelity Bank, N.A. v. Government of Antigua & Barbuda—Permanent Mission*, 877 F.2d 189, 192-96 (2d Cir. 1989) (factual issue as to whether Antigua and Barbuda government's ambassador had apparent authority to obtain loan and waive government's sovereign immunity warranted setting aside default judgment against government).

of appeals. Consequently, MCI's petition should be denied.

II. THE UAE EMBASSY ACTED IN A SOVEREIGN CAPACITY IN PASSING UPON MCI'S PETITION FOR REDRESS.

The proper inquiry in this case is whether the UAE Embassy, in passing upon and eventually denying MCI's petition for redress, "acted in a sovereign or essentially private capacity." *Transamerican Steamship Corp. v. Somali Democratic Republic*, 767 F.2d 998, 1002 (D.C. Cir. 1985). For example, if an embassy or consulate steps out into the marketplace to order goods or services, or to lease real property, its conduct is essentially commercial and private in nature. *See* H.R. Rep. No. 94-1487, 94th Cong. 2d Sess. at 16 (1976), *reprinted in* 1976 *U.S. Code Cong. & Admin. News* 6604, 6615 (giving, as example of commercial activity, "a contract to make repairs on an embassy building");[4] *Joseph v. Office of Consulate General of Nigeria*, 830 F.2d 1018, 1024 (9th Cir. 1987) (lease of residential property to be used as residence by consulate employees and their families), *cert. denied*, 485 U.S. 905 (1988). Similarly, an embassy or consulate acts like a private player in the marketplace when it hires or fires ordinary laborers, clerical staff, or public relations or marketing personnel, H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. at 16 (1976), *reprinted in* 1976 *U.S. Code Cong. & Admin. News* 6604, 6615, since these employees are "not involved in any policy-making" or "privy to any governmental policy deliberations." *Holden v. Canadian Consulate, supra*, 92

[4] *But see Rush-Presbyterian-St. Luke's Medical Center v. Hellenic Republic*, 877 F.2d 574, 579 (7th Cir. 1989), wherein the Seventh Circuit stated, in dicta, that "although private entities often rehabilitate buildings to serve as office space, a foreign state's remodelling [sic] and operation of a chancery building is not a 'commercial' act, since the construction and operation of a diplomatic office are peculiarly sovereign activities."

F.3d at 922 (where consulate's employment of former commercial officer was "more analogous to a marketing agent," in that nature of her work, involving promotion of products, "is regularly done by private persons," her employment was a "commercial activity"; thus, consulate was not entitled to sovereign immunity under the FSIA from former commercial officer's action for wrongful termination).

On the other hand, if the embassy's conduct does not go beyond "the bounds of ordinary diplomatic behavior," *Transamerican Steamship Corp. v. Somali Democratic Republic, supra,* 767 F.2d at 1003, sovereign immunity attaches. Examples of such "ordinary," or what might be better termed "core," diplomatic behavior include (1) "hold[ing] [a] payment pending resolution of [a] dispute" between a host country company and an agency of the foreign country, (2) "attempt[ing] to mediate [a] conflict or negotiate a settlement between [third] parties," or (3) "attempt[ing] . . . to investigate the causes or merits of [a] dispute" between third parties. *Id.* Another traditional or core diplomatic function of a foreign embassy is to pass upon petitions to obtain redress for alleged grievances presented by host country nationals. *See id.* at 1001 (only "[w]hen efforts to obtain redress through diplomatic channels proved unsuccessful," did American shipping company bring suit against foreign state and foreign state agency).

In this case, the UAE embassy did not step out into the marketplace, or otherwise act as a private party, but rather engaged in traditional, ordinary, or core diplomatic behavior in passing upon and eventually denying MCI's petition for redress. After allegedly discovering that the perpetrators of certain unauthorized telephone calls were members of the UAE Student Battalion stationed at Fort Bliss, Texas, MCI admittedly decided "to attempt to deal with this matter on a diplomatic level" (Pet. App. 20a).

After meeting with the UAE ambassador and the UAE military attache at the UAE Embassy in Washington, D.C., Ambassador Mokarrab allegedly made a *conditional* promise that "*if* the unauthorized telephone calls were attributable to the members of the Student Battalion, the UAE would assume responsibility for the calls and . . . pay MCI for such services" (*id.* 21a (emphasis added)).

The UAE ambassador thereupon not only requested that MCI refrain from taking legal action against the members of the Student Battalion, but also asked that MCI "forward to him information relating to [MCI's] investigation and its claim that the unauthorized calls were placed by officers and enlisted men of the Student Battalion" (*id.*). Subsequently, the UAE ambassador telephoned MCI to inform it that "he had turned the information submitted by MCI over to Colonel Mubarak [the UAE Embassy's military attache] for investigation" (*id.* 22a). The UAE military attache thereafter requested additional information to back up MCI's claims, namely a written breakdown of the unauthorized telephone calls by destination (*id.*).

Eventually, the UAE military attache determined that "MCI had failed to prove that any individual Student Battalion member made any of the unauthorized telephone calls," which failure of proof the UAE ambassador termed "serious" (*id.* 23a, 24a). Moreover, after comparing a list of Student Battalion members that MCI had previously provided to the UAE ambassador with the UAE Embassy's own list of UAE personnel, the ambassador reported that at least 10% of the individuals on MCI's list were not UAE personnel (*id.* 24a). Thereafter, the UAE determined that it would not assume responsibility for paying for the unauthorized phone calls (*id.*).

Thus, the UAE Embassy engaged in ordinary or core diplomatic activity by essentially attempting to resolve or settle a dispute that had arisen between third parties

of different nationalities,[5] namely between MCI and certain members of the UAE Student Battalion accused by MCI of having engaged in a theft of its telephone services. The UAE Embassy undertook to investigate the merits of MCI's claims and accusations, and, based on the results of that investigation, determined to deny MCI's petition for redress. Because the embassy at no time entered the marketplace as a private person, but rather stayed strictly within the bounds of ordinary diplomatic behavior, the Fifth Circuit correctly decided that its actions were "clothed with a diplomatic nature, not a commercial one" (*Id.* 8a).

Moreover, the Fifth Circuit's decision comports with the D.C. Circuit's decision in *Transamerican*. In that case, the D.C. Circuit held that the Somali Embassy "exceeded the bounds of ordinary diplomatic behavior" by refusing to accept an American shipper's payment of disputed fees in the form of a check made out to a Somali-government-owned agency. Instead, the embassy instructed the American shipper to electronically transfer the payment directly into the Somali government's commercial bank account. The court emphasized that the embassy "did not hold the payment pending resolution of the dispute" between the American shipper and the Somali agency, "did not attempt to mediate the conflict or negotiate a settlement between the parties," and "apparently made no attempt even to investigate the causes or merits of the dispute." 767 F.2d at 1003. Rather, "[t]he embassy took an active rather than a passive role in the transaction," its activities being "essentially those of a collection agent," a "normal commercial function" that private banks and collection agencies perform "routinely." *Id.*

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[5] "Diplomacy" has been defined as including the "[n]egotiation or intercourse between nations through their representatives," *Black's Law Dictionary* 546 (4th ed. 1968), and "the skillful or successful settlement of differences between peoples." *Webster's Third New International Dictionary* 638 (1976).

By contrast, the UAE Embassy in the case at bar properly adopted a strict position of passive neutrality regarding the MCI-UAE Student Battalion members' dispute. The embassy attempted to resolve or settle the dispute between the parties and, as part of that effort, undertook to investigate the merits of MCI's claims that members of the Student Battalion had made illegal long-distance telephone calls. Only after completing a thorough investigation into the matter did the embassy determine that MCI had failed to prove its claims and that MCI's claims did not warrant redress. Thus, the Fifth Circuit's decision below granting sovereign immunity to such "ordinary diplomatic behavior" was perfectly consistent with the D.C. Circuit's decision in *Transamerican*.

MCI points to the determination of the district court (Pet. App. 17a) that "the UAE's actions in promising to pay restitution closely resembled those of a private employer that sought to extricate its overseas employees from legal difficulties in their host country" (Pet. 13). This analogy, however, is flawed for two fundamental reasons. First, the UAE Embassy was not attempting to extricate its own employees, i.e., embassy personnel, from legal difficulties with MCI; instead, it sought to resolve a dispute that had arisen between third parties. Second, a foreign embassy's act in passing on a host country national's petition for redress of grievances allegedly suffered at the hands of the foreign sovereign's nationals is a power peculiar to sovereigns, rather than one that can also be exercised by private citizens. Thus, while a United States company with offices overseas might unilaterally seek to extricate its own employees from trouble with the law in the host country, such a company has no power unilaterally to adjust grievances suffered as a result of criminal acts committed by foreign nationals in the United States. Rather, private parties, to obtain redress for such griev-

ances, must turn to either the United States Government [6] or to the foreign sovereign, through diplomatic channels.

In short, the Fifth Circuit correctly held that the promises *in question here* "made through diplomatic channels" did not exceed the bounds of ordinary or core diplomatic behavior and therefore did "not constitute commercial activity" (Pet. App. 7a). The Fifth Circuit did not purport to lay down a per se rule that any and all promises made through diplomatic channels will, whatever the circumstances of a particular case, constitute commercial activity. Rather, a careful reading of the court of appeals' opinion indicates that it was properly "sensitive to the particular facts of the case before it." *Rush-Presbyterian-St. Luke's Medical Center v. Hellenic Republic*, 877 F.2d 574, 579 (7th Cir. 1989). Concededly, if a foreign sovereign were to use diplomatic channels to order or to contract for goods or services of the type that private parties routinely purchase, the foreign sovereign would not be entitled to immunity, as it would have exceeded the bounds of ordinary or core diplomatic behavior by entering the marketplace as a private player. In this case, however, the UAE did not use diplomatic channels to order or contract for goods or services from MCI. Moreover, the UAE Embassy did not seek to extricate its own employees from a dispute with MCI. Rather, the embassy sought to pass upon a host national's petition for redress, arising out of a dispute between third parties of different nationalities, a traditional sovereign function of diplomacy.

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[6] *See* U.S. Const. amend. I, guaranteeing to United States citizens the right "to petition the Government for a redress of grievances." It should be noted, however, that even this constitutional guarantee "is not a general waiver of sovereign immunity for citizens to petition the government in any regard in the federal courts of the United States." *Calhoun v. United States*, 32 Fed. Cl. 400, 405 (1994), *aff'd*, 61 F.3d 918 (Fed. Cir. 1995). Similarly, the fact that the UAE Embassy voluntarily agreed to consider MCI's petition for redress cannot be construed as amounting to a waiver of the UAE's sovereign immunity from suit in the courts of the United States.

III. THE FIFTH CIRCUIT PROPERLY APPLIED THE "PRIVATE PERSON" TEST, AND ITS DECISION DOES NOT CONFLICT WITH EITHER *WELTOVER, NELSON*, OR THE DECISIONS OF OTHER COURTS OF APPEALS.

As noted above, a foreign state engages in commercial activity for purposes of the restrictive theory of sovereign immunity adopted by the FSIA "only where its acts 'in the manner of a private player within' the market." *Saudi Arabia v. Nelson, supra,* 507 U.S. at 360 (quoting *Republic of Argentina v. Weltover, Inc., supra,* 504 U.S. at 614). Under this standard, which has been termed the "private party" test, "the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in 'trade and traffic or commerce.'" *Republic of Argentina v. Weltover, Inc.,* 504 U.S. at 614 (quoting *Black's Law Dictionary* 270 (6th ed. 1990) (emphasis in original)).

The Fifth Circuit properly concluded that the acts of the UAE were not of the type by which a private party engages in trade or commerce. As the Fifth Circuit pointed out, "MCI approached Defendants-Appellants not to form a contract for goods or services, but to try and recover its losses from the unauthorized use of its services by third parties" (Pet. App. 8a). The UAE did not respond to a contractual offer by MCI by promising to purchase goods or services, rather it conditionally promised to grant MCI's petition for redress of certain grievances, namely the alleged theft or unauthorized use of MCI's telephone services, *if* MCI both refrained from taking legal action and provided adequate proof that members of the UAE Student Battalion were responsible for the illegal acts in question. Only after the UAE had determined that MCI was unable to prove its charges to the satisfaction of the UAE Embassy and thus that MCI had not fully met the conditions attached to the UAE's initial promises, was its petition for redress denied.

MCI mischaracterizes the UAE's promises in response to its petition for redress as " 'garden variety' offers to settle a dispute" (Pet. 15). MCI was not attempting to settle a commercial dispute that had arisen between itself and the UAE, nor was it even attempting to obtain mediation of a commercial dispute between itself and a UAE-government-owned agency. Rather, MCI was petitioning the UAE through diplomatic channels in an effort "to try and recover its losses from the unauthorized use of its services *by third parties*" (Pet. App. 8a) (emphasis added), who, according to MCI's allegations, were UAE citizen-soldiers.

MCI further argues the UAE's promises conditionally granting its petition for redress are analogous to the agreement of a private employer in a foreign country to assume the debts incurred by its employees, "in order to preserve good relations with the host nation or to avoid disruption of its operations" (Pet. 15). Again, however, this was not a situation where the UAE Embassy promised to assume the debts of its own embassy employees or personnel; rather, the UAE Embassy passed upon a petition for redress involving a dispute between third parties in which the embassy was totally disinterested from a private or commercial standpoint. Moreover, MCI's speculation that the UAE's actions may have been undertaken with motivations similar to those of a private company operating in a foreign country, i.e., in order to preserve good relations with the United States as host country or to avoid disruption of the UAE's operations in the United States, improperly dwells upon the *purpose*, not the *nature*, of the UAE's acts. As this Court pointed out in *Weltover*, "the Act provides that the commercial character of an act is to be determined by reference to its 'nature' rather than its 'purpose.' " *Republic of Argentina v. Weltover, Inc., supra*, 504 U.S. at 614 (quoting 28 U.S.C. § 1603(d)).[7]

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[7] MCI's analogy to parents offering to pay for illegal or overdue phone calls placed by their children (Pet. 15) is even further off

The Fifth Circuit itself properly focused on MCI's purpose in approaching the UAE in determining that the acts of the UAE were not "commercial activity." The Fifth Circuit essentially determined, based on the facts of and surrounding the transaction in question, that MCI did not make an offer "to form a contract for goods or services," a type of conduct engaged in by private parties, but rather presented, through diplomatic channels, a petition for redress "to try and recover its losses from unauthorized use of its services by third parties" (Pet. App. 8a), which petition was ultimately denied by the UAE by an exercise of power "clothed with a diplomatic nature" (*id.* (emphasis added)), and hence "peculiar to sovereigns." *Republic of Argentina v. Weltover, Inc., supra,* 504 U.S. at 614. Thus, the Fifth Circuit properly focused on the diplomatic "nature" of the UAE's acts and promises in considering and denying MCI's petition, not their purpose.

Even if it could be said that the Fifth Circuit considered the surrounding circumstances or "context" in which the alleged acts of the UAE took place, "[i]nsisting that a

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the mark. This is not a case where either the UAE ambassador or the UAE military attache offered to reimburse MCI for illegal phone calls made by friends or family members. Moreover, because a diplomatic official offering to pay the bills of a personal friend or family member would not be acting in an official capacity so as to qualify as a "foreign state" within the meaning of the FSIA, *see* 28 U.S.C. § 1603(a), (b); *Xuncax v. Gramajo,* 886 F. Supp. 162, 175 (D. Mass. 1995) (even if statute applies to individuals acting in their official capacity, FSIA did not apply to acts of defendant as Army Commander and Guatemalan Minister of Defense which "were beyond the scope of the official's authority"); *see also Chuidian v. Philippine National Bank,* 912 F.2d 1095, 1106 (9th Cir. 1990) (while holding that individual acting in his official capacity as member of Philippine commission formed to recover ill-gotten" wealth accumulated by former president of Philippines was entitled to sovereign immunity under FSIA, court stated that such individual "would not be entitled to sovereign immunity for acts not committed in his official capacity"), such a hypothetical situation would at most involve the doctrine of diplomatic immunity, not foreign sovereign immunity.

given act be judged in context before concluding whether it is commercial activity is not inconsistent with eschewing consideration of purpose." *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164, 168 (D.C. Cir. 1994), *cert. denied*, 115 S.Ct. 726 (1995). Thus, in determining that the alleged transaction was not commercial activity, the Fifth Circuit could have properly considered that the alleged acts took place entirely outside a commercial context, thus precluding a finding of "commercial activity." *See* 30 F.3d at 168 ("Unless an act takes place in a commercial context it would be impossible to determine whether it is conducted in the manner of a private player in the market"). In other words, as there was no underlying commercial transaction or "market" to which the alleged promises of the UAE could relate, but rather only an illegal theft of telephone service, the UAE could not be said to have acted in the manner of a private player in the market.

Moreover, the Fifth Circuit's finding of a lack of an adequate "nexus" (Pet. App. 8a) merely referred to the fact that neither the UAE ambassador, the UAE Embassy, nor the UAE itself was at any time personally or directly interested in the subject matter of MCI's petition for redress. The affected members of the UAE Student Battalion were not employees of the UAE Embassy, ambassadorial family members, or otherwise associated with the embassy in any way. Moreover, to the extent the UAE Student Battalion members engaged in illegal or unauthorized use of MCI's services, they acted well beyond the scope of their employment as soldiers of the UAE and therefore stood in the position of "third parties" vis-a-vis the UAE.[8] Finally, no contract had been entered into be-

[8] MCI disputes the Fifth Circuit's characterization of the UAE Student Battalion members as "third parties," contending that this characterization "ignores the close practical and legal relationship between military personnel stationed overseas and their government" (Pet. 19 n.11). As the Fifth Circuit correctly pointed out, however, the making of unauthorized long-distance telephone calls "is not within the Student Battalion's scope of employment" as

tween the UAE (or the UAE Embassy) and MCI for the purchase of telecommunications goods or services. Thus, the actions undertaken by the UAE Embassy in an effort to resolve the dispute, including the conditional promises to pay allegedly made by the UAE ambassador, were neither private nor commercial, but purely diplomatic in nature.[9]

MCI further argues that the Fifth Circuit erred in failing to hold that the alleged promises met the "private party" test, as they amounted to "[p]romises to assume the responsibility for a preexisting debt" which "are regularly made and honored by private parties" (Pet. 20). Again, this analogy to private party behavior breaks down under close scrutiny.

First, even taking all of MCI's allegations as being true, the UAE, through its embassy, did not simply promise to pay the debts of the affected Student Battalion members. Rather, the UAE undertook seriously to consider and ren-

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soldiers stationed overseas (Pet. App. 10a). The affected Student Battalion members were acting as private citizens of the UAE with respect to any personal and illegal long-distance telephone calls they may have made while stationed in the United States. Thus, insofar as the UAE Embassy was concerned, the affected UAE Student Battalion members were as much "third parties" as if they had been a group of UAE citizen-tourists accused by MCI of having engaged in illegal telephone use while visiting the United States.

[9] The alleged promises made by the UAE Embassy personnel in considering MCI's petition for redress cannot reasonably be characterized, as did the dissenting circuit court judge, as "simply a contract for services while UAE felt it was morally obligated to enter into" (Pet. App. 14a). Again, the UAE Embassy was not acting out of a private moral obligation to reimburse MCI for the cost of services illegally used by persons for whom the embassy was directly responsible, e.g., its clerical staff or ambassadorial family members. Rather, the alleged promises were spurred by a sovereign, diplomatic impulse to resolve a dispute between third parties of different nationalities, namely between a United States telecommunications carrier and certain UAE citizen-soldiers temporarily stationed in the United States.

der a decision upon MCI's petition for redress presented through diplomatic channels, a core diplomatic function in which only sovereigns can engage in. This sovereign diplomatic activity involved (1) the entertainment of and a thorough consideration of the merits of MCI's petition for redress, (2) an extensive official investigation of MCI's charges, and (3) a decision by the UAE that, because MCI had not proved to the UAE's satisfaction misconduct on the part of the affected Student Battalion members, MCI's petition should be denied.

The alleged promises of the UAE's diplomatic representatives played, at most, only a small, incidental role in this essentially governmental and diplomatic activity of acting upon a host country national's petition for redress. Congress, in enacting FSIA, intended that the "essential nature" of given behavior be considered in determining whether it constitutes "commercial activity." H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. at (1976), *reprinted in U.S. Code Cong. & Admin. News* 6604, 6615. This legislative history "makes clear that courts should not deem activity 'commercial' as a whole simply because certain aspects of it are commercial." *Letelier v. Republic of Chile*, 748 F.2d 790, 796 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985); *cf. Rush-Presbyterian-St. Luke's Medical Center v. Hellenic Republic, supra*, 877 F.2d at 580 (in determining whether a transaction is commercial activity, "the court should concentrate on the 'basic exchange' embodied in the contract, rather than subsidiary provisions").

Second, even assuming *arguendo* that the promises made by the UAE Embassy's officials were "presumptively" commercial in character, it is well established that many "activities undertaken by a foreign state, although generally resembling conduct routinely engaged in by private parties, may also be labeled 'governmental' and immune from suit under the FSIA." *Rush-Presbyterian-St. Luke's Medical Center v. Hellenic Republic, supra*, 887

F.2d at 579. For example, "while private persons routinely enter employment agreements, employment contracts between a foreign state and its civil servants, *diplomats* or military personnel are not 'commercial' transactions, since the employment of such personnel is intimately connected with the foreign state's formulation and execution of government policy." *Id.* (emphasis added); *see* H.R. Rep. No. 94-1487, 94th Cong. 2d Sess. at 16 (1976), *reprinted in U.S. Code Cong. & Admin. News* 6604, 6615 (specifically noting that "the employment of diplomatic, civil service, or military personnel" is a "public or governmental," rather than commercial activity). In other words, "[b]ecause private parties cannot hire diplomatic, civil service or military personnel, such hiring is necessarily governmental." *Holden v. Canadian Consulate, supra,* 92 F.3d at 921.

Just as contracts for the employment of diplomats are governmental in character even though they generally resemble private employment contracts, conditional promises made by diplomats to pay debts incurred by third-party nationals of the country whose government the diplomat represents, if upon investigation such debts are found to be valid, are also governmental in character despite their surface resemblance to a private party's promise to assume the debts of another. Such promises are intimately connected with the foreign state's formulation and execution of diplomacy, a form of governmental policymaking.[10] Because private parties cannot engage in

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[10] By contrast, leasing space to be used as a residence for embassy employees and their families, *see Joseph v. Office of Consulate General of Nigeria, supra,* acting as a collecting agent for money owed to an agency of the foreign state, *Transamerican Steamship Corp. v. Somali Democratic Republic, supra,* or terminating the employment of a marketing agent or other nonpolicymaking employees, *Holden v. Canadian Consulate, supra,* are actions that are not closely connected with either the formulation or execution of diplomatic policy.

diplomacy, i.e., the official resolution of disputes between third parties of different nationalities, such diplomatic activity, including any promises to assume debts made in the course of such activity, are governmental in nature.

Nor is *Gemini Shipping v. Foreign Trade Organization for Chemicals & Foodstuffs*, 647 F.2d 317 (2d Cir. 1981), to the contrary. *Gemini* involved the activity of two Syrian-government-owned agencies in purchasing rice from a private dealer and arranging with a Belgian corporation for the shipment of the rice to Syria. The Belgian shipper in turn hired a New York shipping firm to transport the rice. The Second Circuit held that the commercial activity exception applied to the Syrian-government-owned agencies' guarantee they would pay any demurrages incurred by the New York firm if its ship was detained while in port in Syria unloading the rice, even though the New York firm had no preexisting contractual relationship with these agencies.

Gemini, however, involved a purely commercial transaction for the sale and transport of rice, not a petition for redress presented by a host country national through diplomatic channels. The promise made by the Syrian agencies to guarantee the payment of demurrages was made through ordinary commercial channels, i.e., by telex, in response to a prior telex from the New York firm that it intended to exercise its contractual right of lien over the cargo due to its concern that the Belgian company would be unable to pay any demurrage should it be incurred. Syrian diplomats were never at any time involved in the transaction.

By contrast, the alleged promises in question here were "made through diplomatic channels" (Pet. App. 7a) in response to MCI's petition for redress, which was likewise presented through diplomatic channels. In addition, unlike in *Gemini* where two Syrian government agencies had previously entered into commercial transactions for the purchase and transport of the grain being shipped by the New York firm, there was no such preexisting commer-

cial transaction for the purchase and use of telecommunications services entered into by either the UAE or the UAE Defense Ministry. Again, the Fifth Circuit correctly determined that, since the underlying dispute in this case "related to services provided to third parties," not to the UAE or a UAE government agency, the UAE Embassy's attempt to resolve that dispute was clothed with a diplomatic nature, not a commercial one" (*Id.* 8a).

CONCLUSION

The Fifth Circuit correctly applied the principles of *Weltover* and *Nelson* in determining that the "commercial activity" exception to the FSIA does not apply to conditional promises to pay made to a host national as part of the purely diplomatic activity involved in passing upon the host national's petition for redress. Private parties can neither engage in official government diplomacy to investigate and resolve disputes between third parties of different nationalities, nor consider and pass on petitions for redress of grievances presented through diplomatic channels, such conduct being "peculiar to sovereigns." *Republic of Argentina v. Weltover, Inc. supra,* 504 U.S. at 614. Moreover, MCI has failed to show that the Fifth Circuit's holding conflicts with the decisions of the other circuit courts of appeals regarding the application of the FSIA's "commercial activity" exception. 28 U.S.C. § 1605(a)(2). Consequently, MCI's petition for a writ of certiorari should be denied.

Respectfully submitted,

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